**Tomy Corporation, a wholly-owned subsidiary of Tomy Kogyo, Inc. *and* General Truck Drivers, Chauffeurs & Helpers, Local 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.** Case 21-CA-19504

March 17, 1981

## DECISION AND ORDER

Upon a charge filed on September 4, 1980, by General Truck Drivers, Chauffeurs & Helpers, Local 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and duly served on Tomy Corporation, a wholly-owned subsidiary of Tomy Kogyo, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 21, issued a complaint on September 25, 1980, and an amendment to the complaint on October 17, 1980, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on April 11, 1980, following a Board election in Case 21-RC-15635,[1] the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate; and that, commencing on or about September 4, 1980, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On October 7, 1980, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint. On October 27, 1980, Respondent filed its answer to the amendment to the complaint.

On December 1, 1980, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on December 9, 1980, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Upon the entire record in this proceeding, the Board makes the following:

### Ruling on the Motion for Summary Judgment

In its response to the Notice To Show Cause and its answer to the complaint, Respondent admits that it has refused to bargain with the Union, but asserts that the Regional Director's certification in Case 21-RC-15635 was erroneous and invalid. Respondent requests that the Board reexamine the Regional Director's decision to affirm the Hearing Officer's findings that Respondent failed to satisfy its burden of proof with respect to its election objections. Respondent also requests the Board to review the Regional Director's sustaining of challenged ballots and his inclusion of seasonal employees in the unit. Counsel for the General Counsel argues that Respondent is not presenting newly discovered or previously unavailable evidence which was not considered by the Board, and is merely attempting to relitigate issues which were or could have been raised in the prior representation proceeding. We agree with the General Counsel.

Our review of the record herein, including the record in Case 21-RC-15635, indicates that the Regional Director's Decision and Direction of Election was issued on October 5, 1978. On October 13 and December 1, 1978, the Regional Director issued Errata to the Decision and Direction of Election. Respondent requested review of the Decision and Direction contending that the Regional Director erred in including seasonal employees in the unit. The Board denied the request for review on October 31, 1978. The election was held on August 17, 1979. The tally of ballots showed that of the valid votes counted, 125 were for, and 113 were against, the Union, and there were 14 challenged ballots. The challenged ballots were sufficient in number to affect the results of the election. On August 21, 1979, the Union filed objections to the election, and on August 23, 1979, Respondent filed objections. On September 18, 1979, the Regional Director issued a Supplemental Decision and Order Directing Hearing, ordering a hearing to resolve the 14 challenged ballots and certain objections. On February 28, 1980, the Hearing Officer's report and recommendations recommended that some challenges to the ballots be sustained and some challenges be overruled; that Respondent's objections be overruled; that the Union's objections be found moot; and that the Union be certified as

[1] Official notice is taken of the record in the representation proceeding, Case 21-RC-15635, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

the collective-bargaining representative of Respondent's employees in the unit described below. Respondent filed exceptions to the Hearing Officer's report on March 19, 1980. On April 11, 1980, the Regional Director issued a Second Supplemental Decision and Certification of Representative affirming the Hearing Officer's report. On May 6, 1980, Respondent requested review of the Second Supplemental Decision and Certification of Representative. On August 13, 1980, the Board denied Respondent's request for review as it raised no substantial issues warranting review.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

## FINDINGS OF FACT

### I. THE BUSINESS OF RESPONDENT

Respondent, a California corporation, is and has been engaged in the business of assembling toys and operates facilities located at 901 East 233rd Street and 800 East 230th Street, Carson, California. In the normal course and conduct of its business operations, Respondent annually sells and ships goods and products valued in excess of $50,000 directly to customers located outside the State of California.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

### II. THE LABOR ORGANIZATION INVOLVED

General Truck Drivers, Chauffeurs & Helpers, Local 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

### III. THE UNFAIR LABOR PRACTICES

#### A. *The Representation Proceeding*

##### 1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees of the Employer at its facilities located at 901 East 233rd Street, Carson, California, and 800 East 230th Street, Carson, California, including assemblers, material handlers, linemen, truckdrivers, forklift operators, quality control employees, shipping clerks, and cafeteria employees; excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

##### 2. The certification

On August 17, 1979, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 21, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on April 11, 1980, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

#### B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about August 20, 1980, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about September 4, 1980, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

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[2] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

Member Zimmerman notes that Member Jenkins premises his dissent from the granting of summary judgment in this case upon his disagreement with the Board's determination in the underlying representation proceeding. Although Member Zimmerman did not participate in that underlying proceeding, he considers the Board bound to grant summary judgment without regard to the merits of the issue respondent now attempts to relitigate. See *Bravos Oldsmobile*, 254 NLRB No. 135 (1981).

Accordingly, we find that Respondent has, since September 4, 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

## IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

## V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

## CONCLUSIONS OF LAW

1. Tomy Corporation, a wholly-owned subsidiary of Tomy Kogyo, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. General Truck Drivers, Chauffeurs & Helpers, Local 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees of the Employer at its facilities located at 901 East 233rd Street, Carson, California, and 800 East 230th Street, Carson, California, including assemblers, material handlers, linemen, truckdrivers, forklift operators, quality control employees, shipping clerks, and cafeteria employees; excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since April 11, 1980, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about September 4, 1980, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Tomy Corporation, a wholly-owned subsidiary of Tomy Kogyo, Inc., Carson, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with General Truckdrivers, Chauffeurs & Helpers, Local 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees of the Employer at its facilities located at 901

East 233rd Street, Carson, California, and 800 East 230th Street, Carson, California, including assemblers, material handlers, linemen, truckdrivers, forklift operators, quality control employees, shipping clerks, and cafeteria employees, excluding all clerical employees, professional employees, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at the Carson, California, facilities copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

MEMBER JENKINS, dissenting:

On August 13, 1980, the Board denied the Employer's request for review of the Regional Director's Second Supplemental Decision and Certification of Representative. I dissented in part for I would have granted review with respect to the Employer's objection which alleged that the Petitioner displayed and distributed a version of the Board's notice of election altered to show an "x" in the "yes" box of the sample ballot. Since I did not agree to the underlying certification in this case and because the issue concerning a possible altered Board document remains for me unresolved, I hereby dissent from this grant of summary judgment.

[3] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with General Truck Drivers, Chauffeurs & Helpers, Local 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees at our facilities located at 901 East 233rd Street, Carson, California, and 800 East 230th Street, Carson, California, including assemblers, material handlers, linemen, truckdrivers, forklift operators, quality control employees, shipping clerks, and cafeteria employes; excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

TOMY CORPORATION, A WHOLLY-OWNED SUBSIDIARY OF TOMY KOGYO, INC.